

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

D. L. TAYLOR, C-05467,	)	
	)	
Plaintiff(s),	)	No. C 12-3424 CRB (PR)
	)	
v.	)	ORDER OF SERVICE
	)	
M. J. JOHNSON, Correctional Officer,	)	(Docket #30)
	)	
Defendant(s).	)	

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Plaintiff, a prisoner at California State Prison, Corcoran, has filed a pro se Fifth Amended Complaint (FAC) under 42 U.S.C. § 1983 alleging that on or around February 20, 2012, while he was at Pelican Bay State Prison (PBSP), Correctional Officer M. J. Johnson used excessive force against him. Plaintiff specifically alleges that as he was at his cell door talking to another correctional officer about Johnson, Johnson kicked plaintiff's cell door "with all of his might," causing the cell door to hit plaintiff in the mouth and knocking out a tooth and chipping one of his partials. Docket #29 at 4.

Plaintiff seeks damages and appointment of counsel.

### DISCUSSION

#### A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable

claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” Id. § 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

#### B. Legal Claims

Prison officials violate the Eighth Amendment if they apply force maliciously and sadistically to cause harm. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). Liberally construed, plaintiff’s allegations that Johnson kicked plaintiff’s cell door so hard that it caused the cell door to hit plaintiff in the mouth and knock out a tooth and chip one of his partials appear to state an arguably cognizable claim for damages under § 1983 for use of excessive force and will be served on Johnson.<sup>1</sup>

#### C. Motion for Appointment of Counsel

Plaintiff’s motion for appointment of counsel (docket #30) is DENIED for

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<sup>1</sup>Although unfortunate, plaintiff’s other allegations against Johnson do not amount to more than threats and verbal harassment and are dismissed. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (allegations of mere threats not cognizable under § 1983); Freeman v. Arpaio, 125 F.3d 732, 738 (9th Cir. 1997) (allegations of verbal harassment and abuse not cognizable under § 1983), overruled in part on other grounds by Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008); see also Hudson, 503 U.S. at 9 (de minimis uses of force almost certainly fail to state a valid excessive force claim).

1 lack of exceptional circumstances. See Terrell v. Brewer, 935 F.2d 1015, 1017  
2 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).

3 **CONCLUSION**

4 For the foregoing reasons and for good cause shown,

5 1. The clerk shall issue summons and the United States Marshal shall  
6 serve, without prepayment of fees, copies of the FAC (docket #29) in this matter,  
7 all attachments thereto, and copies of this order on defendant Correctional Officer  
8 M. J. Johnson at PBSP. The clerk also shall serve a copy of this order on  
9 plaintiff.

10 2. In order to expedite the resolution of this case, the court orders as  
11 follows:

12 a. No later than 90 days from the date of this order, defendant  
13 shall serve and file a motion for summary judgment or other dispositive motion.  
14 A motion for summary judgment must be supported by adequate factual  
15 documentation and must conform in all respects to Federal Rule of Civil  
16 Procedure 56, and must include as exhibits all records and incident reports  
17 stemming from the events at issue. A motion for summary judgment also must  
18 be accompanied by a Rand notice so that plaintiff will have fair, timely and  
19 adequate notice of what is required of him in order to oppose the motion. Woods  
20 v. Carey, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in Rand  
21 v. Rowland, 154 F.3d 952 (9th Cir. 1998), must be served concurrently with  
22 motion for summary judgment).

23 If defendant is of the opinion that this case cannot be resolved by  
24 summary judgment or other dispositive motion, he shall so inform the court prior  
25 to the date his motion is due. All papers filed with the court shall be served  
26 promptly on plaintiff.

1           b.       Plaintiff must serve and file an opposition or statement of  
2 non-opposition to the dispositive motion not more than 28 days after the motion  
3 is served and filed.

4           c.       Plaintiff is advised that a motion for summary judgment  
5 under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your  
6 case. Rule 56 tells you what you must do in order to oppose a motion for  
7 summary judgment. Generally, summary judgment must be granted when there  
8 is no genuine issue of material fact – that is, if there is no real dispute about any  
9 fact that would affect the result of your case, the party who asked for summary  
10 judgment is entitled to judgment as a matter of law, which will end your case.  
11 When a party you are suing makes a motion for summary judgment that is  
12 properly supported by declarations (or other sworn testimony), you cannot simply  
13 rely on what your complaint says. Instead, you must set out specific facts in  
14 declarations, depositions, answers to interrogatories, or authenticated documents,  
15 as provided in Rule 56(e), that contradicts the facts shown in the defendant's  
16 declarations and documents and show that there is a genuine issue of material  
17 fact for trial. If you do not submit your own evidence in opposition, summary  
18 judgment, if appropriate, may be entered against you. If summary judgment is  
19 granted, your case will be dismissed and there will be no trial. Rand v. Rowland,  
20 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App. A).

21           (The Rand notice above does not excuse defendant's obligation to serve  
22 said notice again concurrently with motions for summary judgment. Woods, 684  
23 F.3d at 935.)

24           d.       Defendant must serve and file a reply to an opposition not  
25 more than 14 days after the opposition is served and filed.

26           e.       The motion shall be deemed submitted as of the date the  
27  
28

1 reply is due. No hearing will be held on the motion unless the court so orders at a  
2 later date.


3 3. Discovery may be taken in accordance with the Federal Rules of  
4 Civil Procedure. No further court order under Federal Rule of Civil Procedure  
5 30(a)(2) or Local Rule 16 is required before the parties may conduct discovery.

6 4. All communications by plaintiff with the court must be served on  
7 defendant, or defendant's counsel once counsel has been designated, by mailing a  
8 true copy of the document to defendant or defendant's counsel.

9 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must  
10 keep the court and all parties informed of any change of address and must comply  
11 with the court's orders in a timely fashion. Failure to do so may result in the  
12 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

13 SO ORDERED.

14 DATED: April 24, 2014

  
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CHARLES R. BREYER  
United States District Judge